United Nations A/CN.9/514

General Assembly

Distr.: General
27 May 2002*

Original: English

United Nations Commission on International Trade Law
Thirty-fifth session
New York, 17 – 28 June 2002

Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation

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* The late submission of the document reflects the increase in the workload of the Secretariat and its shortage of professional staff

02-42619 (E) 170602

Draft Guide to Enactment and Use of the UNCITRAL [Model Law on International Commercial Conciliation]

Purpose of this guide

1. In preparing and adopting model legislative provisions on international commercial conciliation, the United Nations Commission on International Trade Law (UNCITRAL or "the Commission") was mindful that such provisions would be a more effective tool for States modernizing their legislation if accompanied by background and explanatory information. The Commission was also aware of the likelihood that the model provisions would be used in a number of States with limited familiarity with conciliation as a method of dispute settlement. Primarily directed to executive branches of Governments and legislators preparing the necessary legislative revisions, the information provided in this Guide should also provide useful insight to other users of the text, including commercial parties, practitioners, academics and judges.

2. Much of this Guide is drawn from the *travaux préparatoires* of the Model Law. The Guide explains why the provisions in the Model Law have been included as essential basic features of a statutory device designed to achieve the objectives of the Model Law. When it drafted the model provisions, the Commission assumed that explanatory material would accompany the text of the Model Law. For example, some issues are not settled in the Model Law but are addressed in the Guide, which is designed to provide an additional source of inspiration to States enacting the Model Law. It might also assist States in considering which provisions of the Model Law, if any, might have to be varied to accommodate particular national circumstances.

3. This Guide to Enactment has been prepared by the Secretariat pursuant to a request made by UNCITRAL. It reflects the Commission's deliberations and decisions at the session where the Model Law was adopted, and the considerations of UNCITRAL's Working Group II (on Arbitration and Conciliation) that conducted the preparatory work.

4. The Guide was adopted by the Commission on [insert date] / The Guide was approved by the Commission on [insert date] for publication under the responsibility of the Secretariat.

I. Introduction to the Model Law

A. Notion of conciliation and purpose of the Model Law

5. The term "conciliation" is used in the Model Law as a broad notion referring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute. There are critical differences among the dispute resolution processes of negotiation, conciliation and arbitration. Once a dispute arises, the parties typically seek to resolve their dispute by negotiating without involving anyone outside the dispute. If the negotiations fail to resolve the dispute, a range of dispute settlement mechanisms is available, including arbitration and conciliation.

6. In arbitration, the parties entrust the dispute resolution process and the outcome of the dispute to the arbitral tribunal that imposes a binding decision on the parties. Conciliation differs from party negotiations in that conciliation involves third person assistance in an independent and impartial manner to settle the dispute. It differs from arbitration because in conciliation the parties retain full control over

the process and the outcome and the process is non-adjudicatory. In conciliation, the conciliator assists the parties in negotiating a settlement which is designed to meet the needs and interests of the parties in dispute (see A/CN.9/WG.II/WP.108, para. 12). The conciliation process is an entirely consensual one in which parties that are in dispute determine how to resolve the dispute, with the assistance of a neutral third party. The neutral third party has no authority to impose on the parties a solution to the dispute.

7. In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation or similar terms. The notion of "alternative dispute resolution" is also used to refer collectively to various techniques and adaptations of procedures for solving disputes by conciliatory methods rather than by an adjudicating method such as arbitration. The Model Law uses the term "conciliation" to encompass all such procedures. To the extent that such "alternative dispute resolution" procedures are characterised by features mentioned above, they are covered by the Model Law (see A/CN.9/WG.II/WP.108, para. 14).

8. Conciliation is being increasingly used in dispute settlement practice in various parts of the world, including regions where until a decade or two ago it was not commonly used. As well, the use of conciliation is becoming a dispute resolution option preferred and promoted by courts and government agencies as well as in community and commercial spheres. This trend is reflected, for example, in the establishment of a number of private and public bodies offering services to interested parties designed to foster the amicable settlement of disputes. Alongside this trend, various regions of the world have actively promoted conciliation as a method of dispute settlement, and the development of national legislation on conciliation in various countries has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate conciliation (see A/CN.9/WG.II/WP.108, para. 15)

9. Conciliation proceedings are dealt with in a number of rules of arbitral institutions and institutions specialising in the administration of various forms of alternative methods of dispute resolution, as well as in the UNCITRAL Conciliation Rules, which the Commission adopted in 1980. These Rules are widely used and have served as a model for rules of many institutions (see A/CN.9/WG.II/WP.108, para.12). The prevailing view that emerged was that, in addition to the existence of such Rules, it would be worthwhile to prepare uniform legislative rules to support the increased use of conciliation. It was noted that while certain issues, such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings or the role of the conciliator in subsequent proceedings could typically be solved by reference to sets of rules such as the UNCITRAL Conciliation Rules, there were many cases where no such rules were agreed upon. The conciliation process might thus benefit from the establishment of non-mandatory legislative provisions that would apply when the parties mutually desired to conciliate but had not agreed on a set of conciliation rules. Moreover in countries where agreements as to the admissibility of certain kinds of evidence were of uncertain effect, uniform legislation might provide a useful clarification. In addition it was pointed out with respect to certain issues, such as facilitating enforcement of settlement agreements resulting from conciliation, that the level of predictability and certainty required to foster conciliation could only be achieved through legislation (see A/51/17, para. 342).

10. Conciliation proceedings may differ in procedural details depending on what is considered the best method to foster a settlement between the parties. The provisions governing such proceedings, as contained in the Model Law, are designed to accommodate those differences and leave the parties and conciliators free to carry out the conciliatory process as they consider appropriate. Essentially the provisions seek to strike a balance

between protecting the integrity of the conciliation process, for example, by ensuring that the parties' expectations regarding the confidentiality of the mediation process are met whilst also providing maximum flexibility by preserving party autonomy.

B. The Model Law as a tool for harmonising legislation

11. A model law is a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it. States are strongly encouraged, however, to inform the UNCITRAL Secretariat of any enactment of the new Model Law (or any other model law resulting from the work of UNCITRAL).

12. In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as "reservations") is much more restricted; in particular trade law conventions usually either totally prohibit reservations or allow only very few, specified ones. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system. This, however, also means that the degree of, and certainty about, harmonisation achieved through model legislation is likely to be lower than in the case of a convention. Because of the flexibility inherent in a model law, the number of States enacting model legislation is likely to be higher than the number of States adhering to a convention. In order to achieve a satisfactory degree of harmonisation and certainty, States should consider making as few changes as possible in incorporating the Model Law into their legal systems, but, if changes are made, they should remain within the basic principles of the Model Law. A significant reason for adhering as much as possible to the uniform text is to make the national law as transparent and familiar as possible for foreign parties, advisers and conciliators who participate in conciliations in the enacting state.

C. Background and history

13. International trade and commerce have grown rapidly with cross-border transactions being entered into by a growing number of entities, including small and medium-sized ones. With the increasing use of electronic commerce, where business is frequently conducted across national boundaries, the need for effective and efficient dispute resolution systems has become paramount. UNCITRAL has drafted the Model Law to assist States in designing dispute resolution processes that are intended to reduce costs of dispute settlement, foster maintaining a cooperative atmosphere between trading parties, prevent further disputes and inject certainty into international trade. By adopting the Model Law, and by educating parties engaged in international commerce about its purposes, the parties will be encouraged to seek non-adjudicative dispute settlement methods which will increase stability in the marketplace.

14. The objectives of the Model Law, which include encouraging the use of conciliation and providing greater predictability and certainty in its use, are essential for fostering economy and efficiency in international trade.

15. The Model Law was developed in the context of recognition of the increasing use of conciliation as a method for settling commercial disputes. The Model Law was also designed to provide uniform rules in respect of the conciliation process. In many countries, the legal rules affecting conciliation are set out in various pieces of legislation and take differing approaches on issues such as confidentiality and evidentiary privilege and exceptions thereto. Uniformity on such topics helps provide

greater integrity and certainty in the conciliation process. The benefits of uniformity are magnified in cases involving conciliation via the Internet where the applicable law may not be self evident.

16. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices. The Commission entrusted the work to one of its working groups, which it named the Working Group II (Arbitration and Conciliation) (hereinafter referred to as "the Working Group"), and decided that the priority items should include work on conciliation. The Model Law was drafted over three sessions of the Working Group being the thirty-third, thirty-fourth and thirty-fifth sessions (A/CN.9/485, A/CN.9/487 and A/CN.9/506 respectively).

17. At its thirty-fifth session, the Working Group completed its examination of the provisions and considered the draft guide to enactment. The Secretariat was requested to revise the text of the draft guide to enactment and use of the Model Law, based on the deliberations in the Working Group. It was noted that the draft model law, together with the draft guide to enactment and use, would be circulated to member States and observers for comment, and presented to the Commission for review and adoption at its thirty-fifth session, to be held in New York from 17 to 28 June 2002 (see, A/CN.9/506 para. 13). *[Note by the Secretariat: this section recording the history of the Model Law is to be completed after final consideration and adoption of the Model Law by the Commission]*

D. Scope

18. In preparing the Model Law and addressing the subject matter before it, the Commission had in mind a broad notion of conciliation, which could also be referred to as "mediation", "alternative dispute resolution", "neutral evaluation" and similar terms. The Commission's intent is that the Model Law apply to the broadest range of commercial disputes. The Commission agreed that the title of the Model Law should refer to international commercial conciliation. While a definition of "conciliation" is provided in article 1, the definitions of "commercial" and "international" are contained in a footnote to article 1 and in paragraph 3 of article 1, respectively. While the Model Law is restricted to international and commercial cases, the state enacting the Model Law may consider extending it to domestic, commercial disputes and some non-commercial ones (see footnote 1 to article1).

19. The Model Law should be regarded as a balanced and discrete set of provisions and could be enacted as a single statute or as a part of a law on dispute settlement.

E. Structure of the Model Law

20. The Model Law contains definitions, procedures, and guidelines on related issues based upon the importance of party control over the process and outcome.

21. Article 1 delineates the scope of the Model Law and defines conciliation generally

and its international application specifically. These are the types of provisions that would generally be found in legislation to determine the range of matters the Model Law is intended to cover. Article 2 provides guidance on the interpretation of the Model Law. Article 3 expressly provides that all the provisions of Model Law may be varied by party agreement except for article 2 and paragraph 3 of article 7.

22. Articles 4 through 12 cover procedural aspects of the conciliation. These provisions will have particular application to the circumstances where the parties have not adopted rules governing a conciliation, and thus are designed to be in the nature of default provisions. They are also intended to assist parties in dispute that may have defined dispute resolution processes in their agreement, in this context acting as a supplement to their agreement.

23. The remaining provisions of the Model Law (articles 12-15) address post-conciliation issues to avoid uncertainty resulting from an absence of statutory provisions governing these issues.

F. Assistance from UNCITRAL Secretariat

24. In line with its training and assistance activities, the UNCITRAL Secretariat may provide technical consultations for Governments preparing legislation based on the Model Law. UNCITRAL provides technical consultation for Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

25. Further information concerning the Model Law as well as the Guide and other model laws and conventions developed by UNCITRAL, may be obtained from the Secretariat at the address below. The Secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

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United Nations Vienna International Centre
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Telefax:	(43-1) 26060-5813
Electronic mail:	uncitral@uncitral.org
Internet Home Page:	http://www.uncitral.org

II. Article-by-article remarks

Article 1. Scope of application

(1) This Law applies to international[1] commercial[2] conciliation.

(2) For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person, or a panel of persons, to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator or the panel of conciliators does not have the authority to impose upon the parties a solution to the dispute.

(3) A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

(4) For the purposes of this article:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

(5) This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.

(6) The parties are free to agree to exclude the applicability of this Law.

(7) Subject to the provisions of paragraph (8) of this article, this Law applies

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[1] States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text: [...] *[Note by the Secretariat: this footnote recording the changes to be brought to the text of the Model Law by States enacting it for domestic as well as international conciliation will be completed after final consideration and adoption of the Model Law by the Commission]*

[2] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

(8) This Law does not apply to:

(a) Cases where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempts to facilitate a settlement; and

(b) [...].

26. The purpose of article 1 is to delineate the scope of application of the Model Law by expressly restricting it to international commercial conciliation. Article 1 defines the terms "conciliation" and "international" and provides the means of determining a party's place of business where more than one place of business exists or a party has no place of business.

27. In preparing the Model Law, it was generally agreed that the application of the uniform rules should be restricted to commercial matters (A/CN.9/468, para. 21; A/CN.9/485, paras. 113-116; A/CN.9/487, para. 89). The term "commercial" is defined in general terms in footnote 2 to article 1(1). The purpose of the footnote is to be inclusive and broad and to overcome any technical difficulties that may arise in national law as to which transactions are commercial. It was inspired by the definition set out in the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration. No strict definition of "commercial" is provided in the Model Law, the intention being that the term be interpreted broadly so as to cover matters arising from all legal relationships of a commercial nature, whether contractual or not. Footnote 1 provides an illustrative list of relationships that are to be considered commercial, thus emphasizing the width of the suggested interpretation and indicating that the test is not based on what the national law may regard as "commercial". This may be particularly useful for those countries where a discrete body of commercial law does not exist and as between countries in which such a discrete law exists, the footnote may play a harmonizing role. In certain countries, the use of footnotes in a statutory text might not be regarded as acceptable legislative practice. National authorities enacting the Model Law might thus consider the possible inclusion of the text of the footnote in the body of the enacting legislation itself.

28. As originally drafted the place of conciliation was one of the main elements triggering the application of the Model Law. In drafting the Model Law however, the Commission agreed that this approach might be inconsistent with current practice. Since parties often did not formally designate a place of conciliation and since, as a practical matter, the conciliation could occur in several places, it was believed to be problematic to use the somewhat artificial idea of the place of conciliation as the primary basis for triggering the application of the Model Law. For these reasons, the Model Law does not provide an objective rule for determining the place of conciliation (A/CN.9/506 para. 21).

29. Paragraph 2 of article 1 sets out the elements for the definition of conciliation. The definition takes into account the existence of a dispute, the intention of the parties to reach an amicable settlement and the participation of an impartial and independent third person or persons that assists the parties in an attempt to reach an amicable settlement. The intent is to distinguish conciliation, on the one hand, from binding arbitration and, on the other hand, from mere negotiations between the parties or their representatives. The words "and does not have the authority to impose upon the parties a binding solution to the dispute" are intended to further clarify and emphasize the main distinction between conciliation and a process such as arbitration (see A/CN.9/487, para. 101 and A/CN.9/WG.II/WP.115, remark 8).

30. Inclusion of the words "whether referred to by the expression conciliation, mediation, or an expression of similar import" is intended to indicate that the Model

Law applies irrespective of the name given to the process. The broad nature of the definition indicates that there was no intention to distinguish among styles or approaches to mediation. The Commission intends that the word "conciliation" would express a broad notion of a voluntary process controlled by the parties and conducted with the assistance of a neutral third person or persons. Different procedural styles and techniques might be used in practice to achieve settlement of a dispute, and different expressions might be used to refer to those styles and techniques. In drafting the Model Law, the Commission intended that it should encompass all the styles and techniques that fall within the scope of article 1.

31. In principle, the Model Law only applies to international conciliation as defined in paragraph 3 of article 1. Paragraph 3 establishes a test for distinguishing international cases from domestic ones. The requirement of internationality will be met if the parties to the conciliation agreement have their places of business in different states at the time that the agreement was concluded or where the State in which either a substantial part of the obligations of the commercial relationship is to be performed or with which the subject-matter of the dispute is most closely connected differs from the State in which the parties have their places of business. Paragraph 4 provides a test for determining a party's place of business where the party either has more than one place of business or where the party has no place of business. In the first case, the place of business is that bearing the closest relationship with the agreement to conciliate. Factors that may indicate that one place of business bears a close relationship with the agreement to conciliate may include; that a substantial part of the obligations of the commercial relationship that is the subject of the dispute is to be performed at that place of business, or that the subject-matter of the dispute is most closely connected to that place of business. Where a party has no place of business, reference is made to the party's habitual residence.

32. The Model Law should not be interpreted as encouraging enacting States to limit its applicability to international cases. The Commission, in adopting the Model Law, agreed that the acceptability of the Model Law would be enhanced if no attempt were made to interfere with domestic conciliation (A/CN.9/487, para. 106). However, the Model Law contains no provision that would, in principle, be unsuitable for domestic cases (A/CN.9/506, para.16; A/CN.9/116, para. 36). An enacting State may in the implementing legislation, extend the applicability of the Model Law to both domestic and international conciliation as provided in footnote 1 to paragraph 1 (A/CN.9/506, para.17). Also, paragraph 5 allows the parties to agree to the application of the Model Law (ie. opt-in to the Model Law) to a commercial conciliation even if the conciliation is not international as defined in the Model Law. Despite the fact that the Model Law is expressly expressed to be limited to commercial conciliation, nothing in the Model Law should prevent an enacting State from extending the scope of the Model Law to cover conciliation outside the commercial sphere. It should be noted that in some jurisdictions, particularly in federal States, considerable difficulties might arise in distinguishing international trade from domestic trade (A/CN.9/506, para. 17).

33. Paragraph 6 allows parties to exclude the application of the Model Law. Paragraph 6 may be used for example, where the parties to an otherwise domestic conciliation agree for convenience on a place of conciliation abroad without intending to make the conciliation "international".

34. Paragraph 7, while recognizing that conciliation is a voluntary process based on the agreement of the parties, also recognizes that some countries have taken measures to promote conciliation for example, by requiring the parties in certain situations to conciliate or by allowing judges to suggest, or to require, that parties conciliate before they continue with litigation. In order to remove any doubt about the application of the Model Law in all these situations, paragraph (7) provides that the Model Law applies irrespective of whether a conciliation is carried out by agreement between the parties or pursuant to a legal obligation or request by a court,

arbitral tribunal or competent governmental entity. The Model Law does not deal with such obligations or with the sanctions that may be entailed by failure to comply with them. Provisions on these matters depend on national policies that do not easily lend themselves to worldwide harmonization. It is suggested that, even if the enacting State does not require parties to conciliate, the provision should nevertheless be enacted because parties in the enacting State may commence conciliation proceedings pursuant to a request by a foreign court, in which case the Model Law should also apply.

35. Paragraph (8) allows enacting States to exclude certain situations from the sphere of application of the Model Law. Subparagraph (a) expressly excludes from the application of the Model Law any case where either a judge or arbitrator, in the course of adjudicating a dispute, undertakes a conciliatory process. This process may be either at the request of the parties that are in dispute or in the exercise of the judge's prerogatives or discretion. This exclusion was considered necessary to avoid undue interference with existing procedural law. Another area of exclusion might be conciliations relating to collective bargaining relationships between employers and employees given that a number of countries may have established conciliation systems in the collective bargaining system which may be subject to particular policy considerations that might differ from those underlying the Model Law. A further exclusion could relate to a conciliation that is conducted by a judicial officer (A/CN.9/WG.II/WP.113/Add.1, footnote 5 and A/CN.9/WG.II/WP.115, remark 7). Given that such judicially conducted conciliation mechanisms are conducted under court rules, and that the Model Law is not intended to deal with the jurisdiction of courts of any state, it may be appropriate to also exclude these from the scope of the Model Law.

References to UNCITRAL documents

A/CN.9/506, paras. 15-36
A/CN.9/WG.II/WP.115,remarks 1-13
A/CN.9/WG.II/WP.116, paras. 23-32, 33-35 and 36
A/CN.9/487, paras. 88-99, 100-109.
A/CN.9/WG.II/WP.113/Add.1, paras. 2-4 and footnotes 3- 7.
A/CN.9/485, paras. 108-109, 111-120 and paras. 123.124.
A/CN.9/WG.II/WP.110, paras. 83-85, 87- 90.
A/CN.9/WG.II/WP.108, para. 11
A/CN.9/468, paras18-19
A/CN.9/460, paras. 8-10

Article 2. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

36. Article 2 provides guidance for the interpretation of the Model Law by courts and other national or local authorities with due regard to being given to its international origin. It was inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods article 3 of the UNCITRAL Model Law on Electronic

Commerce article 8 of the UNCITRAL Model Law on Cross-Border Insolvency and article 4 of the UNCITRAL Model Law on Electronic Signatures. (A/CN.9/506/para.49) The expected effect of article 2 is to limit the extent to which a uniform text, once incorporated in local legislation would be interpreted only by reference to the concepts of local law. The purpose of paragraph (1) is to draw the attention of courts and other national authorities to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law) while enacted as part of domestic legislation and therefore domestic in character, should be interpreted with reference to its international origin in order to ensure uniformity in the interpretation of the Model Law in various countries. Inclusion of court decisions interpreting the Model Law in the UNCITRAL Case Law on UNCITRAL texts (CLOUT) will assist this development.

37. Paragraph 2 states that, where a question is not settled by the Model Law, reference may be made to the general principles upon which it is based. As to the general principles on which the Model Law is based, the following non-exhaustive list may be considered:

(1) to promote conciliation as a method of dispute settlement by providing international harmonized legal solutions to facilitate conciliation which respect the integrity of the process, promote active party involvement and autonomy by the parties;

(2) to promote the uniformity of the law;

(3) to promote frank and open discussions of parties by ensuring confidentiality of the process, limiting disclosure of certain information and facts raised in the conciliation in other subsequent proceedings, subject only to the need for disclosure required by law or for the purposes of implementation or enforcement;

(4) to support developments and changes in the conciliation process arising from technological developments such as electronic commerce.

References to UNCITRAL documents

A/CN.9/506, para.49

Article 3. Variation by agreement

Except for the provisions of article 2 and article 7, paragraph (3), the parties may agree to exclude or vary any of the provisions of this Law.

38. With a view to emphasizing the prominent role given by the Model Law to the principle of party autonomy, this provision has been isolated in a separate article. This type of drafting is also intended to bring the Model Law more closely in line with other UNCITRAL instruments (e.g., article 6 of the United Nations Convention on Contracts for the International Sale of Goods, article 4 of the UNCITRAL Model Law on Electronic Commerce, and article 5 of the UNCITRAL Model Law on Electronic Signatures). Expressing the principle of party autonomy in a separate article may further reduce the desirability of repeating that principle in the context of a number of specific provisions of the Model Law (A/CN.9/WG.II/WP.115, remark 14). Article 3 promotes the autonomy of the parties by leaving to them almost all matters that can be set by agreement. Article 2, regarding interpretation of the Model Law and article 7(3) concerning the fair treatment of the parties are matters that are not subject to the principle of party autonomy.

References to UNCITRAL documents

A/CN.9/506, paras. 51 and 144.
A/CN.9/WG.II/WP.116, para.37
A/CN.9/WG.II/WP.110, para.87

Article 4. Commencement of conciliation proceedings[3]

(1) Unless otherwise agreed by the parties, the conciliation proceedings in respect of a particular dispute that has arisen commence on the day on which the parties to the dispute agree to engage in conciliation proceedings.

(2) If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

39. Article 4 addresses the question of when a conciliation proceeding can be understood to have commenced. The Commission, in adopting the Model Law, agreed that paragraph (1) of this article should be harmonized with paragraph (7) of article 1. This was done to accommodate the fact that a conciliation might be carried out as a consequence of a direction or request by a dispute settlement body such as a court or arbitral tribunal. Article 4 provides that a conciliation commences when the parties to a dispute agree to engage in such a proceeding. The effect of this provision is that, even if there exists a provision in a contract requiring parties to engage in conciliation or a court or arbitral tribunal directs parties to engage in conciliation proceedings, such proceedings will not commence until the parties agree to engage in such proceeding. The Model Law does not deal with any such requirement or with the consequences of the parties' or a party's failure to act as required.

40. The general reference to the "day on which the parties to the dispute agree to engage in conciliation proceedings" is designed to cover the different methods by which parties may agree to engage in conciliation proceedings. Such methods may include, for example, the acceptance by one party of an invitation to conciliate made by the other party, or the acceptance by both parties of a direction or suggestion to conciliate made by a court, arbitral tribunal or a competent government entity.

41. By referring in paragraph 1 of article 4 to an "agree[ment] to engage in conciliation proceedings" the Model Law leaves the determination of when exactly this agreement is concluded to laws outside Model Law. Ultimately, the question of when the parties reached agreement will be a question of evidence (A/CN.9/506, para. 97).

42. Paragraph 2 provides that a party that has invited another to engage in conciliation, may treat this invitation as having been rejected if the other party fails to accept that invitation within thirty days from when the invitation was sent. The

[3] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.

(2) Where the conciliation proceedings have terminated without a settlement, the limitation period resumes running from the time the conciliation ended without a settlement.

time period to reply to an invitation to conciliate has been set at thirty days as provided for in the UNCITRAL Conciliation Rules or any other time as specified in the invitation. This provides maximum flexibility and respects the principle of party autonomy over the procedure to be followed in commencing conciliation.

43. Article 4 does not address the situation where an invitation to conciliate is withdrawn after it has been made. Although a proposal was made during the preparation of the Model Law to include a provision specifying that the party initiating the conciliation is free to withdraw the invitation to conciliate until that invitation has been accepted, it was decided that such a provision would probably be superfluous in view of the possibility offered to both parties to terminate conciliation proceedings at any time under subparagraph (d) of article 12. Also inclusion of a provision regarding the withdrawal of an invitation to conciliate could unduly interfere with the law of contract formation by introducing new rules as to the conditions under which an offer or an acceptance to conciliate might be withdrawn (A/CN.9/WG.II/WP.115, remark 17).

44. The footnote to the title of article 4 (footnote 3) includes text for optional use by States that wish to enact it. The Working Group discussed the question of whether it would be desirable to prepare a uniform rule providing that the initiation of conciliation proceedings would interrupt the running of limitation and prescription periods concerning the claims involved in the conciliation. Strong opposition was expressed to the retention of this article in the main text, principally on the basis that the issue of the limitation period raised complex technical issues and would be difficult to incorporate into national procedural regimes which took different approaches to the issue. Moreover, it was suggested that the provision was unnecessary since other avenues were available to the parties to protect their rights (for example, by agreeing to extend the limitation period or by commencing arbitral or court proceedings for the purpose of interrupting the running of the limitation period). Equally strong argument was presented in favour of inclusion of the text on the basis that preserving the parties' rights during a conciliation would enhance the attractiveness of conciliation. It was said that an agreed extension of the limitation period was not possible in some legal systems and providing a straightforward and efficient means to protect the rights of the parties was preferable to leaving the parties with the option of commencing arbitral or court proceedings. Ultimately, it was agreed to include the provision as a footnote to article 4 for optional use by states that wished to enact it (A/CN.9/506, paras. 93-94).

References to UNCITRAL documents

A/CN.9/506, paras. 53-56 and 93-110
A/CN.9/487, paras. 110 - 115
A/CN.9/WG.II/WP.113/Add.1, para. 4
A/CN.9/485, paras. 127 - 132
A/CN.9/WG.II/WP.110, paras. 95-96

Article 5. Number of conciliators

There shall be one conciliator, unless the parties agree that there shall be a panel of conciliators.

45. Unlike in arbitration where the default rule is three arbitrators, conciliation practice shows that parties usually wish to have the dispute handled by one conciliator. For that

reason, the default rule in article 6 is one conciliator. A number of private international arbitration rules provide a default rule of one arbitrator.

References to UNCITRAL documents

A/CN.9/487, paras. 116 - 117
A/CN.9/WG.II/WP.113/Add.1, para. 5
A/CN.9/506 paras. 58

Article 6. Appointment of conciliators

(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.

(2) In conciliation proceedings with two conciliators, each party appoints one conciliator.

(3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavour to reach agreement on the name of the other conciliators.

(4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:

(a) A party may request such an institution or person to recommend names of suitable persons to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(5) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

(6) When a person is approached in connection with his or her possible appointment as a conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

46. The intent of article 6 is to encourage the parties to agree on the selection of a conciliator. The advantage of the parties first endeavoring to mutually agree on a conciliator is that this approach respects the consensual nature of conciliation proceedings and also provides parties with greater control and therefore confidence in the conciliation process. Although a suggestion was made, while preparing the Model Law, that, where there is more than one conciliator, the appointment of each conciliator should be agreed to by both parties, which would thereby avoid the perception of partisanship, the prevailing view was that the solution allowing each party to appoint a conciliator was the more practical approach. This approach allows for speedy commencement of the conciliation process and might foster settlement in the sense that the two party-appointed conciliators, while acting independently and impartially, would be in a better position to clarify the positions of the parties and thereby enhance the likelihood of settlement. When three or

more conciliators are to be appointed, the conciliator other than the two party-appointed conciliators should, in principle, be appointed by agreement of the parties. This should foster greater confidence in the conciliation process.

47. When no agreement may be reached on a conciliator, reference has to be had to an institution or a third person. Subparagraphs (a) and (b) of paragraph (4) provide that that institution or person may simply provide names of recommended conciliators or, by agreement of the parties, directly appoint conciliators. Paragraph (5) sets out some guidelines for that person or institution to follow in making recommendations or appointments. These guidelines seek to foster the independence and impartiality of the conciliator.

48. Paragraph 6 obliges a person who is approached to act as a conciliator to disclose any circumstance likely to raise justifiable doubts as to his or her impartiality or independence. This obligation is stated to apply not only from the time that the person is approached but also throughout the conciliation. A suggestion was made that the provision address the consequences that might result from failure to make such a disclosure, for example by expressly stating that failure to make such disclosure should not result in nullification of the conciliation process. However, the prevailing view was that the consequences of failure to disclose such information should be left to the provisions of law in the enacting State other than the enactment of the Model Law (A/CN.9/506, para.65).

References to UNCITRAL documents

A/CN.9/506, paras.59 - 66
A/CN.9/WG.II/WP.116, paras. 42 and 43
A/CN.9/487, paras. 116 - 119
A/CN.9/WG.II/WP.113/Add.1, para. 5

Article 7. Conduct of conciliation

(1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner in which the conciliation is to be conducted, the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as the conciliator or the panel of conciliators considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

(3) In any case, in conducting the proceedings, the conciliator or the panel of conciliators shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

49. Paragraph (1) of article 7 stresses that the parties are free to agree on the manner in which the conciliation is to be conducted. It was derived from Article 19 of the UNCITRAL Model Law on International Commercial Arbitration.

50. Paragraph (2) recognizes the role of the conciliator who, while observing the will of the parties may shape the process as he or she considers appropriate.

51. It should be noted that whilst the Model Law does not set out a standard of conduct to be applied by a conciliator, paragraph (3) provides that the conciliator or panel of conciliators seek to maintain fair treatment of the parties by reference to the particular circumstances of the case. Some concern was expressed that the inclusion of a provision governing the conduct of the conciliation could have the unintended effect of inviting parties to seek annulment of the settlement agreement by alleging unfair treatment. However, the prevailing view was that the guiding principles should be retained in the body of the legislative provisions to the effect of providing guidance regarding conciliation, particularly for less experienced conciliators. (A/CN.9/506, para.70). The reference in paragraph (3) to maintaining fair treatment of the parties is intended to govern the conciliation process and not the settlement agreement.

52. Conciliation rules often contain principles that should guide the conciliator in conducting the proceedings. For example, article 7 of the UNCITRAL Conciliation Rules states as follows:

> "(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.
>
> "(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.
>
> "(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.
>
> "(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor".

Some national laws have included some of these guiding principles in their laws on conciliation. Given the different approaches to conciliation, the focus of the process will not always be the same. In order to encompass that variety, the text requires the conciliator to "take into account the circumstances of the case". The Working Group agreed that, while other provisions of article 7 might be subject to contrary agreement between the parties, paragraph (3) should be regarded as setting a minimum standard. Thus, parties are not allowed to agree on a different standard of conduct to be followed by conciliators. To this end, an exception to the general application of Article 3 has been made with respect to paragraph 3 of Article 7.

53. Paragraph (4) clarifies that a conciliator may, at any stage, make a proposal for settlement. Whether, to what extent, and at which stage the conciliator may make any such proposal will depend on many factors including the wishes of the parties and the techniques the conciliator considers most conducive to a settlement.

References to UNCITRAL documents

A/CN.9/506, paras. 67-74
A/CN.9/WG.II/WP.115, remarks 22 and 23
A/CN.9/487, paras. 120 – 127
A/CN.9/WG.II/WP.113/Add.1, para. 5
A/CN.9/485, para. 125
A/CN.9/WG.II/WP.110, paras. 91 - 92

A/CN.9/468 paras. 56 - 59
A/CN.9/WG.II/WP.108, paras. 61 and 62

Article 8. Communication between conciliator and parties

Unless otherwise agreed by the parties, the conciliator, the panel of conciliators or a member of the panel may meet or communicate with the parties together or with each of them separately.

54. Separate meetings between the conciliator and the parties are, in practice, so usual that a conciliator is presumed to be free to use this technique, save for any express restriction agreed to by the parties. Some states have included this principle in their national laws on conciliation by providing that a conciliator is allowed to communicate with the parties collectively or separately. The purpose of this provision is to put this issue beyond doubt.

55. The conciliator should afford the parties equal treatment, which, however, is not intended to mean that equal time should necessarily be devoted for separate meetings with each party. The conciliator may explain to the parties in advance that there may be time discrepancies, both real and imagined, which should not be construed as other than the fact that the conciliator is taking time to explore all issues, interests and possibilities for settlement.

References to UNCITRAL documents

A/CN.9/506, para. 76.
A/CN.9/487, para. 128-129.
A/CN.9/WG.II/WP.110, para. 93
A/CN.9/WG.II.113/Add.1, para 6
A/CN.9/468, paras. 54 and 55
A/CN.9/WG.II/WP.108, paras. 56-57

Article 9. Disclosure of information between the parties

When the conciliator, the panel of conciliators or a member of the panel receives information concerning the dispute from a party, the conciliator, the panel of conciliators or a member of the panel may disclose the substance of that information to the other party. However, when a party gives any information to the conciliator, the panel of conciliators or a member of the panel subject to a specific condition that it be kept confidential, that information shall not be disclosed to the other party.

56. As its title suggests, Article 9 is limited to disclosure of information as between the parties. With respect to disclosure of information to third parties it was widely agreed that the Model Law include a provision expressing a duty of confidentiality (see Article 10). Article 9 expresses the principle that, whatever information that a party gives to a conciliator, that information may be disclosed to the other party. It provides an approach consistent with established practice in many countries as reflected in article 10 of the UNCITRAL Conciliation Rules. The intent is to foster open and frank communication of information between parties and, at the same time, to preserve the parties' rights to maintain confidentiality. The role of the conciliator is to cultivate a candid exchange of information regarding the dispute. Such disclosure fosters the confidence of both parties in the conciliation. However, the principle of disclosure is not absolute, in that the conciliator has the freedom, but not the duty, to disclose such information to the other party. Indeed the conciliator has a duty not to disclose a particular piece of information when the party

that gave the information to the conciliator made it subject to a specific condition that it be kept confidential. This approach is justified because the conciliator imposes no binding decision on the parties. An earlier suggestion requiring that the party giving the information give consent before any communication of that information may be given to the other party was rejected. It was considered that this would be overly formalistic, inconsistent with established practice in many countries and likely to inhibit the entire conciliation process.

57. A broad notion of "information" is preferred in the context of this statutory rule. It is intended to cover all relevant information communicated by a party to the conciliator. The notion of "information", as used in this article, should be understood as not only covering communications that occurred during the conciliation but also communications that took place before the actual commencement of the conciliation.

References to UNCITRAL documents

A/CN.9/506, paras. 77-82.
A/CN.9/487, paras. 130-134.
A/CN.9/WG.II/WP.110, paras. 95 and 96.
A/CN.9/468, paras. 54-55.
A/CN.9/WG.II/WP.108, paras. 58-60
A/CN.9/WG.II/WP.113/Add.1, para.6.

Article 10. Duty of confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

58. In keeping with article 14 of the UNCITRAL Conciliation Rules, support was expressed for the inclusion of a general rule of confidentiality applying to the conciliator and to the parties. (A/CN.9/506, para. 86) A provision on confidentiality is important as the conciliation will be more appealing if parties can have confidence that the conciliator will not take sides or disclose their statements, particularly in the context of other proceedings. The provision is drafted broadly referring to "all information relating to the conciliation proceedings" to cover not only information disclosed during the conciliation proceedings but also to cover the substance and the result of these proceedings as well as matters relating to a conciliation that occurred before the agreement to conciliate was reached including, for example, discussions concerning the desirability of conciliation, the terms of an agreement to conciliate, the choice of conciliators, an invitation to conciliate and the acceptance or rejection of such an invitation. The phrase "all information relating to the conciliation proceedings" was supported because it reflected a tried and tested formula set out in article 14 of the UNCITRAL Conciliation Rules.

59. Article 10 is expressly subject to party autonomy to meet concerns expressed that it might be inappropriate to impose upon the parties a rule that would not be subject to party autonomy and could be very difficult, if not impossible, to enforce. This reinforces the principle objective of the Model Law that is to respect party autonomy and also to provide a clear rule to guide parties in the absence of contrary agreement.

60. The rule is also subject to express exceptions, namely where disclosure is required by law, such as an obligation to disclose evidence of a criminal offence, or where disclosure is required for the purposes of implementation or enforcement of a settlement agreement. Although the Working Group initially considered including a list of specific exceptions it was strongly felt that listing exceptions in the text of the Model Law might

raise difficult questions of interpretation, in particular as to whether the list should be regarded as exhaustive. The Working Group agreed that an illustrative and non-exhaustive list of possible exceptions to the general rule on confidentiality would more appropriately be provided in the Guide to Enactment. Examples of such laws may include laws requiring the conciliator or parties to reveal information if there is a reasonable threat that a person will suffer death or substantial bodily harm if the information is not disclosed, laws requiring disclosure if it is in the public interest. For example to alert the public about a health or environmental or safety risk.

References to UNCITRAL documents

A/CN.9/506, paras.83-86
A/CN.9/487; paras. 130-134

Article 11. Admissibility of evidence in other proceedings

(1) Unless otherwise agreed by the parties, a party that participated in the conciliation proceedings or a third person, including a conciliator, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding, any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) Views expressed or suggestions made by a party to the conciliation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the conciliation proceedings;

(d) Proposals made by the conciliator;

(e) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator;

(f) A document prepared solely for purposes of the conciliation proceedings.

(2) Paragraph (1) of this article applies irrespective of the form of the information or evidence referred to therein.

(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph (1) of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

(4) The provisions of paragraphs (1), (2) and (3) of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.

(5) Subject to the limitations of paragraph (1) of this article, evidence that is otherwise admissible in arbitral or court proceedings does not become inadmissible as a consequence of having been used in a conciliation.

61. In conciliation proceedings, the parties may typically express suggestions and views regarding proposals for a possible settlement, make admissions, or indicate their willingness to settle. If, despite such efforts, the conciliation does not result in a settlement and a party initiates judicial or arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. This possibility of such a "spillover" of information may discourage parties from actively trying to reach a settlement during conciliation proceedings, which would reduce the usefulness of conciliation (A/CN.9/WG.II/WP.108, para.18). Thus, Article 11 is designed to encourage frank and candid discussions in conciliation by prohibiting the use of information listed in paragraph (1) in any later proceedings. The words "or a third person" are used to clarify that persons other than the party (for example, witnesses or experts) who participated in the conciliation proceedings are also bound by paragraph (1).

62. The provision is needed in particular if the parties have not agreed on a provision such as that contained in article 20 of the UNCITRAL Conciliation Rules which provides that the parties must not "rely on or introduce as evidence in arbitral or judicial proceedings [...]:

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

63. However even if the parties have agreed on a rule of that type, the legislative provision is useful because, at least under some legal systems, the court may not give full effect to agreements concerning the admissibility of evidence in court proceedings.

64. In view of the general rule contained in Article 3, the view was expressed that the opening words of Article 11 "unless otherwise agreed by the parties" were superfluous. However, the prevailing view was that maintaining those words would better reflect the function of the rule in paragraph (1) as a default rule of conduct for the parties (A/CN.9/506, para.102).

65. The approach in this article is designed to eliminate any uncertainty as to whether the parties may agree not to use as evidence in arbitral or judicial proceedings certain facts that occurred during the conciliation. The Model Law aims at preventing the use of certain information in subsequent judicial or arbitral proceedings regardless of whether the parties have agreed to a rule such as that contained in article 20 of the UNCITRAL Conciliation Rules. Where the parties have not agreed upon a contrary rule, the Model Law provides that the parties shall not rely in any subsequent arbitral or judicial proceedings on evidence of the types specified in the model provisions. The specified evidence would then be inadmissible in evidence and the arbitral tribunal or the court could not order disclosure.

66. Paragraph (2) provides that the prohibition in article 11 is intended to apply to the specified information, for example, regardless of whether they appear in a document or not.

67. Paragraph (3) provides that an arbitral tribunal or court shall not order the disclosure of information referred to in paragraph (1) unless such disclosure is permitted or required

under the law governing the arbitral or judicial proceedings. This provision was considered necessary to properly clarify and reinforce paragraph (1). In order to achieve the purpose of promoting candor between the parties engaged in a conciliation, they must be able to enter into the conciliation knowing the scope of the rule and that it will be applied. Paragraph (3) expresses this principle by restricting the rights of courts, arbitral tribunal or government entities from ordering disclosure of such information and by requiring such bodies to treat any such information offered as evidence as being inadmissible. There may be situations, however, where evidence of certain facts would be inadmissible under article 11, but the inadmissibility would have to be overridden by an overwhelming need to accommodate compelling reasons of public policy. For example: the need to disclose threats made by a participant to inflict bodily harm or unlawful loss or damage; where a participant attempts to use the conciliation to plan or commit a crime; where evidence is needed to establish or disprove an allegation of professional misconduct based on the conduct occurring during a conciliation; where evidence is needed in a proceeding in which fraud or duress is in issue regarding the validity or enforceability of an agreement reached by the parties; where statements made during a conciliation shows a significant threat to public health or safety. The final sentence in paragraph (3) of Article 11 expresses such exceptions in a general manner and is in similar terms to the exception expressed with respect to the duty of confidentiality in article 10. Paragraph 4 extends the scope of application of paragraphs 1 to 3 (inclusive) to apply not only to related subsequent proceedings but also to unrelated subsequent proceedings. Paragraph 5 makes it clear that all information that otherwise would be admissible as evidence in a subsequent court or arbitral proceeding does not become inadmissible solely by reason of it being raised in an earlier conciliation proceeding (for example, in a dispute concerning a contract of carriage by goods by sea, a bill of lading would be admissible to prove the name of the shipper, notwithstanding its use in a conciliation). It is only certain statements made in conciliation proceedings (i.e. views, admissions, proposals and indications of willingness to settle) that are inadmissible, not any underlying evidence that gave rise to the statement. Thus evidence that is used in conciliation proceedings is admissible in any subsequent proceedings just as it would be if the conciliation had not taken place.

68. In some legal systems a party may not be compelled to produce in court proceedings a document that enjoys a "privilege" - for example, a written communication between a client and its attorney. The privilege may, however, be deemed lost if a party has relied on the privileged document in a proceeding. Privileged documents may be presented in conciliation proceedings with a view to facilitating settlement. In order not to discourage the use of privileged documents in conciliation, the enacting State may wish to consider including a uniform provision stating that the use of a privileged document in conciliation proceedings does not constitute a waiver of the privilege.

References to UNCITRAL documents

A/CN.9/506, paras.101-115
A/CN.9/487 paras. 139-141
A/CN.9/WG.II/WP.113/Add.1 at page 6
A/CN.9/485; paras 139-146
A/CN.9/WG.II/WP.110; paras. 98-100
A/CN.9/468; paras. 22-30
A/CN.9/WG.II/WP.108; paras. 16 and 18-28
A/CN.9/460, paras.11-13

Article 12. Termination of conciliation

The conciliation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the

date of the agreement;

(b) By a written declaration of the conciliator or the panel of conciliators, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) By a written declaration of the parties addressed to the conciliator or the panel of conciliators to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of a party to the other party and the conciliator or the panel of conciliators, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

69. The provision enumerates various circumstances in which conciliation proceedings may be terminated. In subparagraph (a) the provision uses the expression "conclusion" instead of "signing" in order to better reflect the possibility of entering into a settlement by electronic communications. Any enacting State that has not enacted the UNCITRAL Model Law on Electronic Commerce should consider inclusion of a provision along the lines of article 6 of that instrument when enacting this Model Law.[4] (A/CN.9/506, para. 88). The first circumstance listed in subparagraph (a) is where the conciliation ends successfully, namely where a settlement agreement is reached. The second circumstance set out in subparagraph (b) allows the conciliator or panel of conciliators to bring the conciliation proceedings to an end, after consulting with the parties. Subparagraph (c) provides that both parties may declare the conciliation proceedings to be terminated and subparagraph (d) allows one party to give such notice of termination to the other party and the conciliator or panel of conciliators. As noted above in the context of article 4, the parties may be under an obligation to commence and participate in good faith in conciliation proceedings. Such an obligation may arise, for example, from an agreement of the parties entered into before or after the dispute arose, from a statutory provision or from a direction or request by a court. The sources of such an obligation differ from country to country and the Model Law does not deal with them. The Model Law also does not deal with the consequences of failure by a party to comply with such an obligation (see above, para. 39).

References to UNCITRAL documents

A/CN.9/506, paras. 87-91
A/CN.9/487; paras. 135-136
A/CN.9/WG.II/WP.113/Add.1, para.6
A/CN.9/WG.II/WP.110; paras. 95 – 96
A/CN.9/ 468 paras. 50-53.
C.f. Article 15 of the UNCITRAL Conciliation Rules

Article 13. Conciliator acting as arbitrator

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or any related contract.

[4] Article 6 of the Model Law on Electronic Commerce provides in part that: "where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference."

70. Article 13 reinforces the effect of article 11 by limiting the possibility of the conciliator acting as arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or any related contract. The purpose of this article is to provide greater confidence in the conciliator and in conciliation as a method of dispute settlement. A party may be reluctant to strive actively for a settlement in conciliation proceedings if it has to take into account the possibility that if the conciliation is not successful, the conciliator might be appointed as an arbitrator in subsequent arbitration proceedings.

71. In some cases, the parties might regard prior knowledge on the part of the arbitrator as advantageous, particularly if the parties think that this knowledge would allow the arbitrator to conduct the case more efficiently. In these cases, the parties may actually prefer that the conciliator and not somebody else be appointed as an arbitrator in the subsequent arbitral proceedings. The provision poses no obstacle to the appointment of the former conciliator provided the parties depart from the rule by agreement – for example, by a joint appointment of the conciliator to serve as an arbitrator. However in some cases there may be ethical considerations suggesting that the conciliator should decline to act.

72. The provision applies to either "a dispute that was or is the subject of the conciliation proceedings" or "in respect of another dispute that has arisen from the same contract or any related contract". The first limb extends the application of the provision to both past and ongoing conciliations. The second limb extends the scope of the article to cover disputes arising under contracts that are distinct but commercially and factually closely related to the subject matter of the conciliation. Whilst the formulation is very broad, determining whether a dispute raises issues relating to the main contract would require an examination of the facts of each case.

73. An earlier draft of the Model Law contained a provision dealing with the situation where an arbitrator acts as a conciliator. It was noted that such a provision would relate to the functions and competence of an arbitrator, and to arbitration practices that differ from country to country and are influenced by legal and social traditions. There is no settled practice on the question of an arbitrator acting as conciliator and some practice notes suggest that the arbitrator should exercise caution before suggesting or taking part in conciliation proceedings relating to the dispute. It was considered inappropriate to attempt unifying these practices through uniform legislation. Although the provision was deleted, the Commission agreed that the Model Law was not intended to indicate whether or not an arbitrator could act or participate in conciliation proceedings relating to the dispute and that this was a matter left to the discretion of the parties and arbitrators acting within the context of applicable law and rules (A/CN.9/506, para.132).

74. An earlier draft also restricted a conciliator from acting as representative or counsel of either party subject to contrary party agreement. It was suggested that in some jurisdictions, even if the parties agreed to the conciliator acting as a representative or counsel of any party such an agreement would contravene ethical guidance to be followed by conciliators and could also be perceived as undermining the integrity of conciliation as a method for dispute settlement. A proposal to amend the provision so as not to leave this question to party autonomy was rejected on the basis that it undermined the principle of party autonomy and failed to recognize that, in some jurisdictions where ethical rules required a conciliator not to act as representative or counsel, the conciliator would always be free to refuse to act in that capacity. On this basis, it was agreed that the provision should be silent on the question whether a conciliator could act as representative or counsel of any of the parties (A/CN.9/506, para.117).

References to UNCITRAL documents

A/CN.9/WG.II/WP.110 footnote 30

A/CN.9/WG.II/WP.108; paras.29-33
A/CN.9/468; paras. 31-37
A/CN.9/485; paras. 148-153
A/CN.9/487; paras. 142-145
A/CN.9/506, paras. 117-123 and 130.

Article 14. Resort to arbitral or judicial proceedings

(1) Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with.

(2) A party may nevertheless initiate arbitral or judicial proceedings where, in its sole discretion, it considers such proceedings necessary to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

75. In the preparation of the Model Law, it was agreed that the text should contain a rule preventing parties from initiating an arbitral or judicial proceeding while conciliation was pending. Paragraph 1 deals with the effect of the agreement of the parties to engage in conciliation. The consequence of that provision is that the court or arbitral tribunal will be obliged to bar litigation or an arbitration from proceeding if that would be in violation of the agreement of the parties.

76. Paragraph 2 of article 14 deals with the issue whether, and to what extent, the party may initiate court or arbitral proceedings during the course of conciliation proceedings. The idea behind this provision is to allow the parties to initiate arbitral or court proceedings only in circumstances where, in the opinion of the party initiating such proceedings, such action is "necessary for preserving its rights'. Possible circumstances that may require initiation of arbitral or court proceedings may include the necessity to seek interim measures of protection or to avoid the expiration of the limitation period. This provision would need to be integrated with the requirements of existing procedural and substantive law in the enacting State.

References to UNCITRAL documents

A/CN.9/506, paras. 125-129
A/CN.9/487, paras. 147-150.
A/CN.9/WG.II/WP.113/Add.1, para.8
A/CN.9/485, paras. 155-158
A/CN.9/468, paras 45-49
A/CN.9/WG.II/WP.108, paras.49-52

Article 15. Enforceability of settlement agreement[5]

If the parties reach and sign an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State inserts a description of the method of enforcing settlement agreements or refers to provisions governing such enforcement*].

[5] When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory.

77. Legislative solutions regarding the enforceability of settlements reached in conciliation proceedings differ widely. Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would, for the purposes of enforcement, be treated as or similarly to an arbitral award. Reasons given for introducing expedited enforcement usually aim to foster the use of conciliation and to avoid situations where a court action to enforce a settlement might take months or years to reach judgement.

78. Some States have no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. This understanding that conciliation settlements were enforceable as contracts has been restated in some laws on conciliation.

79. In some national legislation, parties who had settled a dispute are empowered to appoint an arbitrator specifically to issue an award based on the agreement of the parties. For example, in China, where conciliation may be conducted by an arbitral tribunal, legislation provides that "if conciliation leads to a settlement agreement, the arbitral tribunal shall make a written conciliation statement or make an arbitration award in accordance with the settlement agreement. A written conciliation statement and a written arbitration award shall have equal legal validity and effect." (Arbitration Law of the People's Republic of China, Article 51). In some jurisdictions, the status of an agreement reached following conciliation depends on whether or not the conciliation took place within the court system and legal proceedings in relation to the dispute are on foot. For example, under Australian legislation, agreements reached at conciliation held outside the court cannot be registered with the court unless the proceedings are on foot whereas in court-based conciliation schemes, a court may make orders in accordance with the settlement agreement and these orders have legal force and are enforceable as such.

80. Some legal systems provide for enforcement in a summary fashion if the parties and their attorneys signed the settlement agreement and it contained a statement that the parties may seek summary enforcement of the agreement. Also, settlements might be the subject of expedited enforcement if, for example, the settlement agreement was notarized or formalized by a judge or co-signed by the counsel of the parties. For example, in Bermuda, legislation provides that "If the parties to an arbitration agreement which provides for the appointment of a conciliator reach agreement in settlement of their differences and sign an agreement containing the terms of settlement... the settlement agreement shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement and may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgement or order to the same effect, and where leave is so given, judgement may be entered in terms of the agreement"(Bermuda, Arbitration Act 1986). Similarly in India, a settlement agreement which has been signed by the parties is final and binding on the parties and persons claiming under them respectively and "shall have the same status and effect as if it is an arbitral award" (India, The Arbitration and Conciliation Ordinance, 1996, articles 73 and 74, respectively). However in some jurisdictions the enforceability of a settlement agreement reached during a conciliation will only apply if the settlement agreement was reached as part of an arbitration process. For example, in Hong Kong (Special Administrative Region of the People's Republic if China), section 2C of the Arbitration Ordinance provides that "Where conciliation proceedings succeed and the parties make a written settlement agreement (whether prior to or during arbitration proceedings), such agreement may be enforced by the Court of First Instance as if it were an award, provided that the settlement agreement has been made by the parties to an arbitration agreement". This provision is supported by Order 73, rule 10 of the Rules of the High Court which applies the procedure for enforcing arbitral awards, to the enforcement of settlement agreements

so that summary application may be made to the court and judgement may be entered in terms of the agreement.

81. The text of the article is aimed at reflecting the smallest common denominator between the various legal systems. Although the Working Group recognized that the text was ambiguous, since it might be read in different languages and different legal systems either as creating a high degree of enforceability or as merely referring to the obvious fact that a settlement agreement could be made enforceable through appropriate procedures, State were invited to submit official comments on the draft text and the Secretariat held informal consultations regarding the feasibility of improving on the text. *[Note by the Secretariat: paragraphs 77 to 81 are expected to require a degree of redrafting as a result of the discussion at the 35th Session of the Commission]*

References to UNCITRAL documents

A/CN.9/506, paras. 38-48, 34-49 and 133-139
A/CN.9/487; paras. 153-159
A/CN.9/WG.II/WP.110 paras 105-112
A/CN.9/WG.II/WP.113/Add.1, para.9
A/CN.9/485, para.159.
A/CN.9/468; paras 38-40
A/CN.9/WG.II/WP.108 para. 16 and paras 34-42
A/CN.9/460, paras.16-18